

Message Text

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ORIGIN OPIC-06

INFO OCT-01 ARA-10 ISO-00 EB-07 L-02 COME-00 H-02 AID-05

OMB-01 TRSE-00 CIAE-00 INR-07 NSAE-00 /041 R

66613

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R 052149Z MAR 75

FM SECSTATE WASHDC

TO AMEMBASSY SAN SALVADOR

UNCLAS STATE 049672

E.O. 11652: N/A

TAGS: EINV ES

SUBJ: OPIC BILATERAL AGREEMENT

1. ON JANUARY 29, OPIC REPS FREEMAN AND GILBERT ACCOMPANIED BY CLYDE TAYLOR MET WITH RICARDO CASTENADA AND OTHERS FROM MINISTRY, FOREIGN RELATIONS TO DISCUSS STATUS OF OPIC BILATERAL.
2. OPIC REPS PROMISED TO FURNISH CASTENADA WITH BRIEF INFORMAL MEMO EXPLAINING SUBROGATION RIGHTS UNDER BILATERAL. TEXT OF MEMO IN ENGLISH AND SPANISH FOLLOWS.
3. OPIC WOULD APPRECIATE EMBASSY FURNISHING CASTENADA WITH THIS INFORMAL MEMO. OPIC WOULD ALSO APPRECIATE EMBASSY MAKING ANY CHANGES IN SPANISH TRANSLATION WHICH IT DEEMS SUITABLE.
4. IN LIGHT OF CONVERSATION WITH CASTENADA OPIC HOPES PROVIDING MEMO WILL SPEED CONGRESSIONAL RATIFICATION OF OPIC-GOES BILATERAL SIGNED ON APRIL 28, 1969. OPIC IS POUCHING SEPARATELY FOR EMBASSY FILE A COPY OF APRIL 28, 1969 BILATERAL.

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5. SUBROGATION RIGHTS OF OPIC PURSUANT TO BILATERAL

AGREEMENT, DATED APRIL 28, 1969, BETWEEN
THE GOVERNMENTS OF EL SALVADOR AND THE UNITED
STATES OF AMERICA

A. INVESTMENT GUARANTEES ISSUED BY OPIC PROVIDE THAT UPON
PAYMENT OF COMPENSATION TO THE INVESTOR FOLLOWING A CLAIM IN
RESPECT OF A GUARANTEED INVESTMENT, OPIC WILL BE SUBROGATED TO ALL
THE RIGHTS AND CLAIMS WHICH THE INVESTOR HAS OR MAY HAVE RESULTING
FROM THE GUARANTEED INVESTMENT. THE INVESTOR IS GENERALLY REQUIRED
TO ASSIGN TO OPIC THESE RIGHTS AND CLAIMS AS WELL AS THE SHARES,
PROMISSORY NOTES OR OTHER SECURITIES EVIDENCING THE GUARANTEED
INVESTMENT.

B. THE RIGHT OF A GUARANTOR TO BE SUBROGATED TO THE RIGHTS AND
CLAIMS OF A GUARANTEED PARTY FOLLOWING PAYMENT UNDER THE GUARANTY
IS EQUALLY WELL ESTABLISHED IN BOTH CIVIL LAW COUNTRIES AND COMMON
LAW COUNTRIES. A BASIC PURPOSE OF THE RIGHT OF SUBROGATION IS TO
ENABLE THE GUARANTOR TO PURSUE THE SAME RIGHTS AS THE GUARANTEED
PARTY IN ORDER TO MAKE SOME RECOVERY, IF POSSIBLE, THEREBY
REDUCING THE ULTIMATE AMOUNT OF LOSS.

C. THE LEGISLATION WHICH CREATED OPIC REQUIRES OPIC TO
MAKE CERTAIN THAT SUITABLE ARRANGEMENTS EXIST TO PROTECT OPIC'S
INTEREST IN CONNECTION WITH RIGHTS OR CLAIMS TO WHICH OPIC MAY
BECOME SUBROGATED AS A RESULT OF A PAYMENT UNDER A GUARANTY.
OPIC COMPLIES WITH THIS STATUTORY REQUIREMENT BY NOT OPERATING ITS
PROGRAMS IN A COUNTRY UNLESS THE GOVERNMENT OF THE PROJECT
COUNTRY FIRST AGREES THAT OPIC'S PROGRAM CAN BE INSTITUTED. THE
AGREEMENT ALSO PROVIDES, AMONG OTHER THINGS, THAT IF OPIC PAYS
COMPENSATION TO AN INVESTOR, THE GOVERNMENT OF THE PROJECT COUNTRY
WILL RECOGNIZE OPIC'S SUBROGATION RIGHTS WHICH IS THE RIGHT OF
OPIC TO BE SUBSTITUTED IN PLACE OF THE INVESTOR SO THAT OPIC WILL
HAVE THE VERY SAME RIGHTS AND CLAIMS WHICH HAD BEEN PREVIOUSLY
HELD BY THE INVESTOR IN RESPECT OF THE GUARANTEED INVESTMENT. THUS
FOR EXAMPLE, OPIC WOULD BE ASSURED THAT IT WOULD BE ABLE TO INSTITUTE
AN ACTION AT LAW AGAINST A THIRD PARTY WHO WAS RESPONSIBLE FOR THE
LOSS OR DAMAGE SUSTAINED BY THE INVESTOR, JUST AS THE INVESTOR
COULD HAVE DONE.

D. THE PROVISION RECOGNIZING OPIC'S SUBROGATION
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RIGHTS IN THE BILATERAL AGREEMENT BETWEEN THE GOVERNMENT OF
EL SALVADOR AND THE UNITED STATES GOVERNMENT WILL DO NO MORE THAN
STATE EXPLICITLY THE FACT THAT ONCE OPIC PAYS A CLAIM, IT CAN EXERCISE
THE SAME RIGHTS AND PURSUE THE SAME REMEDIES THAT WERE
AVAILABLE TO THE INVESTOR. INDEED THIS IS STATED EXPLICITLY
IN PARAGRAPH 3 OF THE BILATERAL AGREEMENT: "NOTHING IN THE

SUBROGATION ENVISAGED HEREIN SHALL GIVE THE GOVERNMENT OF THE UNITED STATES GREATER RIGHTS AGAINST THE ASSETS OF THE ENTERPRISE FOR WHICH THE INVESTMENT GUARANTY WAS GRANTED THAN THE RIGHTS OF THE SUBROGATING INVESTOR"; AND IN PARAGRAPH 6(A) OF THE BILATERAL AGREEMENT, AGAIN WITH REFERENCE TO PARAGRAPH 3, "NONE OF THE PROVISIONS OF THIS AGREEMENT SHALL GIVE THE GOVERNMENT OF THE UNITED STATES OF AMERICA OTHER RIGHTS THAN THOSE HELD BY THE INVESTOR WITH RESPECT TO ANY PETITIONS, CLAIMS OR RIGHTS TO WHICH THE GOVERNMENT OF THE UNITED STATES OF AMERICA HAS BEEN SUBROGATED."

E. IN SUMMARY, THE BILATERAL AGREEMENT DOES NOT GIVE OPIC RIGHTS UNDER SUBROGATION WHICH ARE GREATER THAN THOSE THAT AN INVESTOR COULD HAVE ASSERTED UNDER THE LAWS OF EL SALVADOR. RATHER, OPIC AS SUBROGEE WOULD BE ASSERTING ONLY THOSE RIGHTS OF THE INVESTOR WHICH IT HAS SUCCEEDED.

5. DERECHOS DE SUBROGACION DE LA OPIC EN VIRTUD DEL ACUERDO BILATERAL DEL 28 DE ABRIL DE 1969 ENTRE EL GOBIERNO DE EL SALVADOR Y EL GOBIERNO DE LOS ESTADOS UNIDOS DE AMERICA

A. LAS GARANTIAS DE INVERSION EMITIDAS POR LA OPIC DISPONEN QUE UNA VEZ EFECTUADO EL PAGO DE LA COMPENSACION AL INVERSIONISTA DESPUES DE UNA RECLAMACION RESPECTO DE UNA INVERSION GARANTIZADA, LA OPIC QUEDARA SUBROGADA A TODOS LOS DERECHOS Y RECLAMACIONES QUE EL INVERSIONISTA TENGA O PUEDA TENER COMO RESULTADO DE LA INVERSION GARANTIZADA. GENERALMENTE, EL INVERSIONISTA TIENE QUE ASIGNAR A LA OPIC ESOS DERECHOS Y RECLAMACIONES ASI COMO LAS ACCIONES O LOS PAGARES O LOS OTROS VALORES QUE DEMUESTREN LA INVERSION GARANTIZADA.

B. EL DERECHO DEL GARANTE A SER SUBROGADO EN LOS DERECHOS
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Y RECLAMACIONES DE UNA PARTE GARANTIZADA DESPUES DEL PAGO CONFORME A LA GARANTIA, ESTA IGUALMENTE BIEN ESTABLECIDO EN LOS PAISES DE DERECHO ROMANO Y EN LOS DE DERECHO CONSUECUDINARIO. UNA FINALIDAD FUNDAMENTAL DEL DERECHO DE SUBROGACION ES LA DE PERMITIR AL GARANTE DISPONER DE LOS MISMOS DERECHOS QUE LA PARTE GARANTIZADA CON EL FIN DE REALIZAR ALGUNA RECUPERACION, DE SER POSIBLE, DISMINUYENDO ASI EL MONTO TOTAL DE LA PERDIDA.

C. LAS LEYES QUE CREARON A LA OPIC EXIGEN QUE LA OPIC SE ASEGURE DE QUE EXISTAN CIERTOS ARREGLOS ADECUADOS QUE LA PERMITAN PROTEGER SUS INTERESES EN RELACION CON DERECHOS O RECLAMACIONES EN LOS QUE LA OPIC PUDIERE QUEDAR SUBROGADA COMO RESULTADO DEL PAO CONFORME A UNA GARANTIA. LA OPIC ACATA ESTE REQUISITO DE LA KEY AL NO AUTORIZAR SUS PROGRAMAS EN UN PAIS A MENOS QUE EL GOBIERNO DEL PAIS DEL PROYECTO PRIMERAMENTE

ACUERDE QUE EL PROGRAMA DE LA OPIC PUEDE INSTITUIRSE. ESTE ACUERDO TAMBIEN DISPONE, ENTRE OTRAS COSAS, QUE SI LA OPIC PAGA COMPENSACION A UN INVERSIONISTA, EL GOBIERNO DEL PAIS DEL PROYECTO RECONOCERA LOS DERECHOS DE SUBROGACION DE LA OPIC LO QUE SIGNIFICA EL DERECHO DE LA OPIC A SER SUBSTITUIDA AL INVERSIONISTA DE FORMA TAL QUE LA OPIC TENDRA LOS MISMOS DERECHOS Y PODRA EFECTUAR LAS MISMAS RECLAMACIONES QUE ANTES DISPONIA EL INVERSIONISTA RESPECTO DE LA INVERSION GARANTIZADA. ASI ES QUE, POR EJEMPLO, LA OPIC TENDRIA LA SEGURIDAD DE QUE PODRIA INSTITUIR CARGOS CONTRA UNA TERCERA PART QUE FUESA RESPONSABLE DE LAS PERDIDAS O DANOS SUFRIDOS POR EL INVERSIONISTA, EN IGUAL FORMA QUE LO PODRIA HABER HECHO EL INVERSIONISTA.

D. LA DISPOSICION QUE RECONOCE LOS DERECHOS DE SUBROGACION DE LA OPIC EN EL ACUERDO BILATERAL ENTRE EL GOBIERNO DEL EL SALVADOR Y EL GOBIERNO DE LOS ESTADOS UNIDOS DE AMERICA NO HACE MAS QUE ESTIPULAR EXPLICITAMENTE EL HECHO DE QUE UNA VEZ QUE LA OPIC HAYA PAGADO UNA RECLAMACION PUEDE EJERCER LOS MISMOS DERECHOS Y DISPONER DE LAS MISMAS AVENIDAS DE SOLUCION QUE ESTABAN A LA DISPOSICION DEL INVERSIONISTA. ESTE PRECEPTO SE ESTIPULA EXPLICITIAMENTE EN EL PARRAFO 3 DEL ACUERDO BILATERAL: "NADA DE LO QUE SE DICE EN LA SUBROGACION AQUI CONTEMPLADA, DARA AL GOBIERNO DE LOS ESTADOS UNIDOS MAYORES DERECHOS, SOBRE EL ACTIVO DE LA EMPRESA CON RESPECTO A LA CUAL HA EMITIDO LA GARANTIA DE INVERSION, QUE AQUELLOS QUE ASISTEN AL INVERSIONISTA QUE HA SUBROGADO"; Y EN EL INCISO (A) DEL PARRAFO UNCLASSIFIED

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6 DEL ACUERDO BILATERAL, TAMBIEN CON REFERENCIA AL PARRAFO 3, "NINGUNA DE LAS ESTIPULACIONES DEL PRESENTE ACUERDO OTORGARA AL GOBIERNO DE LOS ESTADOS UNIDOS DE AMERICA OTROS DERECHOS QUE AQUELLOS DE QUE DISPONIA EL INVERSIONISTA CON RESPECTO A CUALESQUIERA PETICIONES, RECLAMACIONES O DERECHOS EN LOS CUALES QUEDARA SUBROGADO EL GOBIERNO DE LOS ESTADOS UNIDOS DE AMERICA".

E. EN RESUMEN, EL ACUERDO BILATERAL NO OTORGA A LA OPIC CONFORME A LA SUBROGACION MAYORES DERECHOS QUE LOS QUE ASISTEN AL INVERSIONISTA CONFORME A LAS LEYES DE EL SAVADOR. MAS BIEN, LA OPIC, POR SUBROGACION, EJERCERIA UNICAMENTE LOS DERECHOS DEL INVERSIONISTA QUE LE HUBIEREN SIDO TRASPASADOS. INGERSOLL

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: AGREEMENTS, PUBLICATIONS, POLICIES, TEXT, INVESTMENT GUARANTEES, DIPLOMATIC DISCUSSIONS
Control Number: n/a
Copy: SINGLE
Draft Date: 05 MAR 1975
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: n/a
Disposition Approved on Date:
Disposition Authority: n/a
Disposition Case Number: n/a
Disposition Comment:
Disposition Date: 01 JAN 1960
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1975STATE049672
Document Source: CORE
Document Unique ID: 00
Drafter: OPIC/GC: PGILBERT
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: D750078-0626
From: STATE
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1975/newtext/t19750379/aaaactdv.tel
Line Count: 215
Locator: TEXT ON-LINE, ON MICROFILM
Office: ORIGIN OPIC
Original Classification: UNCLASSIFIED
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 4
Previous Channel Indicators: n/a
Previous Classification: n/a
Previous Handling Restrictions: n/a
Reference: n/a
Review Action: RELEASED, APPROVED
Review Authority: ShawDG
Review Comment: n/a
Review Content Flags:
Review Date: 13 JUN 2003
Review Event:
Review Exemptions: n/a
Review History: RELEASED <13 JUN 2003 by JonesKG>; APPROVED <25 FEB 2004 by ShawDG>
Review Markings:

Margaret P. Grafeld
Declassified/Released
US Department of State
EO Systematic Review
05 JUL 2006

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: OPIC BILATERAL AGREEMENT
TAGS: EINV, ES, OPIC, (CASTENEDA, RICARDO)
To: SAN SALVADOR
Type: TE
Markings: Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 05 JUL 2006